eBay Inc. v. Digital Point Solutions, Inc. et al Doc. 37

LAW OFFICES OF PATRICK K. McCLELLAN
Patrick K. McClellan #077352
pkellymc@pacbell.net
2211 Michelson Drive, Suite 700
Irvine, CA 92612
Telephone (949)261-7615
Facsimile (949)851-2772
Attorney for Defendant KESSLER'S FLYING CIRCUS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC., Plaintiff, vs. DIGITAL POINTS SOLUTIONS, INC., SHAWN HOGAN; KESSLER'S FLYING CIRCUS; THUNDERWOOD HOLDINGS, INC.; TODD DUNNING; DUNNING ENTERPRISES, INC.; BRIAN DUNNING; BRIANDUNNING.COM; and DOES 1-20, Defendants.	Case No. 08-4052 NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT BY KESSLER'S FLYING CIRCUS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF PATRICK K. McCLELLAN [FRCP 12(b)(1), 12(b)(3), 12(b)(6)] Date: December 12, 2008 Time: 9:00 a.m. Ctrm: 3 - Hon. Jeremy Fogel presiding

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and/or 12(b)(3), Defendant Kessler's Flying Circus ("KFC") will and hereby does move to dismiss the First Amended Complaint (the "Complaint") filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay"). The hearing on the motion will be at 9:00 a.m. on December 12, 2008, or as soon thereafter as the parties may be heard before the Honorable Jeremy Fogel in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California.

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This Motion is and will be made on the grounds that the Complaint fails to state a claim upon which relief may be granted (Rule 12(b)(6)), lack of subject matter jurisdiction (Rule 12(b)(1)), and improper venue (Rule 12(b)(3)). This motion is based on the Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; all supporting papers, including the Request for Judicial Notice, the Complaint; all other pleadings and papers on file in this action; and such other arguments and papers as may be permitted by the Court.

Dated: November 6, 2008

LAW OFFICE OF PATRICK K. McCLELLAN

By: ______________________
PATRICK K. McCLELLAN
Attorney for Kessler's Flying Circus

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION.

This Motion to Dismiss Plaintiff eBay, Inc.'s ("eBay") First Amended Complaint ("FAC") is made on the following grounds:

A. Lack of subject matter jurisdiction;

B. Failure to state a claim for which relief can be granted;

C. Venue is improper and if the case is not dismissed it should be transferred to the proper court; and

D. A nearly identical action has been pending in Southern California in the Superior Court for the State of California for nearly a year, filed by eBay's agent, seeking nearly the identical relief, from some of the identical defendants, based on the identical alleged conduct.

Kessler's Flying Circus ("KFC") was a participant in eBay's Affiliate Marketing Program. KFC participated in eBay's Affiliate Marketing Program through an agreement with eBay's agent Commission Junction, Inc. In its First Amended Complaint, eBay claims that, through its agent Commission Junction, Inc., eBay paid more in commissions to KFC, than KFC was entitled to. eBay claims that by using a "cookie stuffing" scheme, KFC was credited for more sales than it should have been, and eBay seeks recovery of the alleged excess commissions paid to KFC.

A nearly identical action was filed by eBay's agent Commission Junction, Inc., in the Superior Court for the State of California, and has been pending there for nearly a year.[1] Defendants in this case, Kessler's Flying Circus, Thunderwood Holdings, Todd Dunning and Brian Dunning, are also defendants in the Commission Junction case. The identical "cookie stuffing" scheme is alleged in the Commission Junction case. Commission Junction seeks recovery in the state court suit of the exact same commissions that eBay seeks to recover herein. The Commission Junction case is

[1] A copy of the Commission Junction complaint is attached to the Declaration of Patrick McClellan as Exhibit 1.

scheduled for trial in the Orange County Superior Court in March 2009. The Commission Junction case is pending in Superior Court in Orange County.

eBay's FAC includes two federal claims that are without merit. The federal claims are alleged solely for the improper purpose of attempting to obtain federal jurisdiction in an attempt to require defendants to fight the same identical allegations in two different courts at the same time.[1]

2. BACKGROUND

eBay's Affiliate Marketing Program

Todd Dunning and Brian Dunning did business under the name Kessler's Flying Circus ("KFC") in 2006 and 2007. KFC was in the business of participating in an Internet promotional program for eBay known as eBay's Affiliate Marketing Program ("AMP"). KFC was paid through Commission Junction, Inc. ("Commission Junction"), eBay's agent for the AMP. KFC was paid commissions related to the number of new customers to eBay's website as a result of KFC's promotional efforts.

eBay's FAC alleges that the AMP "is designed to increase traffic to eBay's website through the placement of advertisements for eBay on third-party websites"…. seeks to "increase traffic to its site" through the use of "persons or entities that advertise on behalf of eBay" and causes these advertisers for eBay, called "affiliates" to be compensated when their activity "causes a user to take some action at eBay's site that directly provides revenue to eBay or indicates that the new user is likely to take such action in the future." (FAC ¶¶ 18 & 19) The FAC alleges that three steps are required for an affiliate to earn a commission under the AMP: (1) an affiliate must publish an eBay advertisement, (2) an Internet user is directed to the eBay website as a result of the advertisement (called a "Referred Visit"), and (3) the Internet user engages in a "Revenue Action" which is defined as becoming a new registered user of eBay within 30 days or purchases something on eBay within seven days of a Referred Visit. (FAC ¶¶ 18 & 19) Although eBay purposefully avoids alleging that KFC was an "affiliate" with eBay's AMP, the heart of eBay's claim is that it paid commissions to KFC (via Commission Junction) for Revenue Actions that allegedly were not properly earned by KFC under the terms of the Affiliate Marketing Program. (FAC, ¶ 32)

Commission Junction as eBay's Agent

eBay alleges that it "used the services of Commission Junction... in administering the Affiliate Marketing Program." (FAC, ¶ 20) The program was "governed" by an Advertiser Service Agreement through which "Commission Junction was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay." (FAC, ¶ 20)

Commission Junction's Lawsuit

eBay's agent, Commission Junction, commenced a lawsuit on August 13, 2007 to recover from Todd Dunning, Brian Dunning, Thunderwood Holdings, Inc., and KFC, all defendants herein, alleged overpayments or mis-payments of fees paid under eBay's AMP. In its complaint, Commission Junction seeks recovery of the exact same commissions from the KFC defendants, based upon the very same alleged "cookie stuffing" scheme, that eBay alleges herein. In its suit, Commission Junction alleges that "on or about April 14, 2005" the defendants "entered into a written Publisher Service Agreement ('Agreement') whereby [Plaintiff] agreed to provide goods and services to and for [all defendants]." *(See,* Request for Judicial Notice, Exhibit 1 thereto, Second Amended Complaint, ¶ 12). Commission Junction alleges that the Publisher Services Agreement is the contract under which KFC provided the marketing services described above to eBay. A copy of the Publisher Services Agreement is Exhibit A to Commission Junction's Second Amended Complaint.

Commission Junction specifically alleges that all defendants "beginning in April of

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[1] The remaining claims asserted by eBay in the FAC are state law claims under California statutes (Penal Code § 502 and

2007... breached the Agreement by, *inter alia,* inflating traffic, forcing cookies, infringing on others proprietary rights, providing links and widgets to wrongfully promote and/or force traffic to eBay.com, and promoting objectionable content as that is defined in the Agreement." *(See,* Request for Judicial Notice, Exhibit 1 thereto, Second Amended Complaint, ¶ 16) Commission Junction alleges that defendants were paid commissions in June 2007 relating to eBay's AMP for which they were not entitled and that eBay has refused to reimburse Commission Junction for the funds it paid to KFC. *(See,* Request for Judicial Notice, Exhibit 1 thereto, Second Amended Complaint, ¶ 17 and 19) Defendants were terminated by eBay and Commission Junction from the AMP as of June 20, 2007.

The Publisher Service Agreements

As part of securing "affiliates" for eBay's Affiliate Marketing Program, CJ and eBay entered into "Publisher Service Agreements" ("PSA") with affiliates such as KFC. The PSA alleged by CJ in its currently pending state court action filed in Orange County (the "State Court Action") applicable to KFC is attached as Exhibit "A" to the Second Amended Complaint filed in the State Court Action. Paragraph 9(d) of the PSA contains the following forum selection clause:

> This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. **The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California.** The parties consent to such venue and jurisdiction and waive any right to a trial by jury. (Emphasis added)

In addition to the PSA, affiliates such as KFC were required to enter into a Supplemental Terms and Conditions Agreement with CJ and eBay (the "T&C Supplement"). The T&C Supplement expressly affirms and supplements the terms of the PSA which contains the venue selection clause cited above:

> eBay Terms and Conditions
> eBay Affiliate Program - Supplemental Terms and Conditions
>
> **In consideration for Your participation in the Affiliate Program the**

Business and Professions Code § 17200), restitution, unjust enrichment and common law fraud.

> **"Program ") maintained by eBay Inc. ("eBay ") through Commission Junction, Inc. ("CJ"), You agree to comply with these Supplemental Terms and Conditions ("Terms and Conditions ") in addition to the terms of the Commission Junction Publisher Service Agreement ("PSA").** If any of these Terms and Conditions conflict with those of the PSA, then these Terms and Conditions will control. Capitalized terms not defined herein have the meanings set forth in the PSA. (Emphasis added)

The T&C Supplement does not contain a venue selection clause in conflict with the one contained in the PSA.

3. LEGAL STANDARD APPLICABLE TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

A party seeking to invoke the jurisdiction of a federal court bears the burden of establishing subject-matter jurisdiction. *See, Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. *375*, 377, 114 S. Ct. 1673, *1675* (1994). It is presumed that federal jurisdiction is lacking until the plaintiff proves otherwise. *Wolfe v. Strankman,* 392 F.3d *358*. 362 (9th Cir. 2004); *Kokkonen,* 511 U.S. at 377, 114 S. Ct. at *1675*. Furthermore, a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *Nissan Motor Co. v. Nissan Computer Corp.*, 204 F.R.D. 460,463 (C.D. Cal. 2001) ("Under 12(b)(6), 'the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. The Court should test the sufficiency of the Complaint only after excising from consideration all unsupported conclusory allegations. See *Holden v. Hagopian,* 978 F.2d 1115, 1121(9th Cir. 1992). Since no allegation of diversity jurisdiction is made in the FAC and since no diversity exists, unless there is a valid federal question presented, the Court is without subject mater jurisdiction and the case should be dismissed. As set forth below, there is nor federal question presented and therefore no subject matter jurisdiction.

4. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER THE COMPUTER FRAUD AND ABUSE ACT

Plaintiff's FAC does not contain the allegations necessary to state a claim for relief under the Computer Fraud and Abuse Act ("CFAA") 11 U.S.C. § 1030. To establish a CFAA claim, Plaintiff must show that Defendants intentionally accessed a protected computer without authorization and thereby caused damage or loss (11 U.S.C. § 1030(g)). First, as detailed below, the allegations of the FAC show that the KFC Defendants did not access a protected computer without authorization as required by 11 U.S.C. § 1030(a)(4) . Second, the FAC fails to allege the damage or loss required by 11 U.S.C. § 1030(g). The FAC fails to state a claim for violation of Section 1030.

1. The FAC Shows the KFC Defendants Did Not Access the eBay Computers.

A prerequisite to potential liability under the CFAA is that the alleged violator has accessed Plaintiff's computer without authorization. (*Int'l Ass'n of Machinists & Aero. Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 498 (D. Md. 2005). Although paragraph 34 of the FAC contains a general conclusory allegation parroting the language of Section 1030(a)(4), the specific allegations in the FAC show clearly that Defendants did not access to the eBay computers at all.

The KFC conduct complained of in the FAC is described as a "cookie stuffing" scheme. However, under the "cookie stuffing" scheme specifically described, the allegations show that the KFC Defendants did not access the Plaintiffs computers. The following allegations from the FAC show that the KFC Defendants are alleged to have accessed *other internet user's computers*, but not Plaintiff's:

a. Cookies are "*stored in the user's web browser*." (Paragraph 21)

b. "cookie stuffing is a term to describe the forced placement of a cookie… *on the user's computer…*" (Paragraph 24)

c. "the cookie was stuffed *on the user's computer by one or more defendants…*" (Paragraph 27)

d. Defendants "used technology that *would stuff cookies only on those computers that had not previously been stuffed*." (Paragraph 28)

The specific allegations in the FAC concerning the cookie stuffing scheme show that the KFC Defendants never accessed the eBay computers as required for a claim to exist under Section 1030(a)(4).

The court must determine the viability of the alleged claim under the CFAA on the basis of the actual and specific allegations set forth in the FAC, not the conclusory and contradictory allegation from paragraph 34. See *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992).

2. The FAC Fails to Allege the Damage or Loss Necessary to State a Claim for Relief under the CFAA.

Section 1030(g) requires that to maintain a civil action under the CFAA, Plaintiff must allege damage or loss. Under Section 1030(e)(8) "damage" is defined as "...any impairment to the integrity or availability of data, a program, a system, or information." Under Section 1030(e)(11) loss "means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."

The FAC contains no allegation of specific damage or loss as defined under sections 1030(e)(8) or 1030(e)(11). The only "damage" allegation in the First Cause of Action in found in paragraph 38. It is another generic and conclusory allegation, the primary portion of which is made on "information and belief:"

> "Defendants KFC...fraudulently obtained commissions for Revenue Actions that were in no way related to those Defendants advertisements and for which those Defendants were due no compensation. Upon information and belief, through their unauthorized access, Defendants KFC...also caused harm to eBay's computers and cause loss to eBay in each year...aggregating more than $5,000."

Since the allegations in the FAC make it clear that the KFC Defendants never accessed the eBay computers, there is no way that eBay computers were damaged. There is no allegation, nor could there be, that KFC's cookie stuffing scheme impaired the integrity or availability of data, a program, system or information on eBay's computers. Absent the required allegation of such specific damage, no claim has been stated. The generic allegation, on information and belief, is contradicted by the specific allegations and must be disregarded in determining the sufficiency of the pleadings.

The FAC alleges that eBay suffered an economic loss because it paid unearned commissions to KFC, but not because its computers were damaged. "Loss" under the CFAA has consistently meant the cost of investigating or remedying damage to a computer or the cost incurred because the computer's service was interrupted. *Nexans Wires, S.A. v. Sark-USA, Inc.* 319 F. Supp.2d 468, 475 (S.D.N.Y. 2004). Furthermore, the "loss" must also relate to the improper conduct. See *Civic Center Motors, Ltd. v. Mason Street Import Cars. Ltd.*, 387 F. Supp. 2d 378, 381 (S.D.N.Y. 2005) that held the alleged loss must relate to investigating or remedying damage to the accessed computer at issue or the inoperability of the accessed computer system.

The cases finding that a remedy exists under Section 1030 are very different from this case. In *America Online, Inc. v. National Health Care Discount, Inc.* 121 F. Supp 2d 1255, 1274 damage under the statute was found where availability to, and diminished capacity of, the Plaintiff's computer system was caused. In *United States v. Mitra*, 405 F.3d 492, 493, damage under the statute included the "non-availability" of Plaintiff's computer system. In *B&B Microscopes v. Luigi Armogida*, 532 F. Supp. 2d 744, 758 (WD Pa 2007) the actual deletion of data constituted damage under the statute. The FAC does not contain any allegations of damage or loss sufficient to trigger liability under the CFAA.

Since the FAC does not contain the necessary allegations of access and damage or loss, eBay's complaint against the KFC Defendants for violation of the CFAA must be dismissed.

5. EBAY'S RICO CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

Since the Court should dismiss the federal CFAA claim brought by eBay, the RICO claim should also be dismissed, since the only remaining claims are common law fraud and unfair competition. "[C]ivil RICO liability is 'reserved ...for 'ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *SecureInfo Corporation v. Telos Corporation,* 387 F. Supp. 2d 593, 614 (E.D. Va. 2005) (citing, *Al-A bood v. El-Sharmari* 217 F.3d 225, 238 (4th Cir. 2000) and *Menasco, Inc. v. Wasserman,* 886 F.2d 681, 684 (4th Cir. 1989)) The Court in the *SecureInfo* case observed that "RICO claims are not to be used for 'garden-variety fraud claims better prosecuted under state law,' but rather for 'cases involving a more serious scope of activity." *Id.*

The claims alleged in the *SecureInfo* case are similar to the claims asserted by eBay herein. In *SecureInfo,* plaintiff sued under the CFAA for unauthorized access to computers, RICO, state law fraud, copyright violations, and tortuous interference. On a motion to dismiss, the Court dismissed the CFAA claim because the defendants did not access a computer without authorization or in excess of authorized access as required to state a claim under the statute. The Court allowed the copyright claim under federal law to proceed, but nevertheless dismissed the RICO claim after examining the "predicate acts" and "pattern" requirements of RICO. The Court found that plaintiff's complaint:

> does not state a claim for violation of RICO because the factual allegations do not meet the requirements for a 'pattern of racketeering activity. Instead, Plaintiffs claim is one for 'garden-variety fraud', and Plaintiff does not properly allege continuity. Plaintiffs alleged facts do not establish 'past conduct that by its nature projects into the future with a threat of repetition.' *Id.* at 615

Just as in the FAC, where eBay is the only "victim" of KFC's alleged scheme to obtain commissions that were not properly earned, the Court in *SecureInfo* observed that the plaintiffs allegations established only that the "RICO defendants sought to fraudulently induce one victim ... for a narrow and specific purpose. [A] pattern of racketeering activity was not established in cases like this one." *Id.* A RICO claim should be dismissed where the alleged fraudulent activity involved a limited alleged fraudulent purpose, a relatively short duration, and a single alleged victim. These are exactly the characteristics of the RICO claim that eBay makes against KFC. Just as in *SecureInfo,* the allegations in the FAC are "not sufficiently outside the heartland of fraud cases to warrant RICO treatment' when the main predicate acts were mail and wire fraud…there was only one victim of the fraud and the alleged scheme was narrowly focused." *Id.*

Similarly, in *Royce International Broadcasting Corporation v. Field,* 2000 U.S. Dist. LEXIS 2369 (N.D. Cal. 2000) the Court concluded that plaintiff had alleged nothing more than a single effort to induce Royce to enter into a contract with Entercom, and that in accordance with the Ninth Circuit's holding in *Medallion Television Enterprise v. SelecTV,* 833 F.2d 1360 (9th Cir. 1988) such allegations cannot constitute the requisite 'pattern of racketeering activity' for RICO purposes.

> "Such allegations may state a claim for fraudulent inducement to enter a single contract, which is one of the claims plaintiff has asserted in the pending Sacramento County Superior Court Action. They do not, however, state a 'pattern of racketeering activity' for purposes of a RICO claim. *See, Medallion* 833 F.2d 1364 (when plaintiff alleged that defendant performed various acts towards the commission of 'a single fraudulent inducement to enter a contract,' no pattern of racketeering activity existed)." *Royce International Broadcasting, supra. Id* at *10.

In *McColm v. Restoration Group, Inc.,* 2007 U.S. Dist. LEXUS 36478 (ED Cal. 2007) plaintiff filed a federal court action, "related to an agreement to clean and restore certain personal property following a fire at plaintiff's father's residence." *Id* at *3 The Court said that "after careful review of the complaint, the Court concludes that plaintiff has attempted, unsuccessfully, to conflate simple state law contract and fraud claims involving California residents into a federal RICO action. More specifically, plaintiff has failed to allege criminal 'predicate acts' and 'continuity' required to establish a 'pattern of racketeering activity." *Id* at *15-16 "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement. *Turner v. Cook,* 362 F.3d 1219, 1230, (9th Cir. 2004)." "Here, plaintiffs allegations concern events arising from a single contract, and plaintiffs dissatisfaction with defendant's services performed (or not) thereunder. These events occurred over an eight to nine-month period, and culminated in defendants filing of a foreclosure action in State Court." *Id* at *13 "Here, plaintiff makes no allegation that defendants have engaged or will engage in misconduct similar to that alleged with regard to her contract." *Id* at *23 The Court concluded that the plaintiff failed to state a claim under RICO and that an amendment would be futile. Since only state law claims remained in the complaint, the entire complaint was dismissed. For these same reasons, that eBay is the sole alleged victim and the alleged conduct occurred over a relatively short period of time, eBay's RICO claim should be dismissed for failure to state a claim on which relief may be granted.

6. NO FEDERAL QUESTION EXISTS SO THE CASE SHOULD BE DISMISSED

It is the Plaintiff's burden to establish jurisdiction based on a federal question. *Wolfe v. Strankman,* 392 F.3d *358,* 362 (9th Cir. 2004). For the reasons discussed above, eBay has failed to allege a valid federal claim under CFAA or RICO, and so there is no federal question jurisdiction. Nor can eBay allege diversity jurisdiction because the parties are not completely diverse. Where the Court's jurisdiction over state law claims is based solely on supplemental jurisdiction under Section 1367 and the federal claims are being dismissed, the Court should dismiss the state law claims for failure of jurisdiction. 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Trigon Ins. Co. v. Columbia Naples Capital, LLC, 235* F.Supp.2d 498, 507 (E.D. Va. 2002) (Hudson, J.) (dismissing state claims where federal claims dismissed under Rule12(b)(6)).

7. THE ACTION SHOULD BE DISMISSED FOR IMPROPER VENUE

A forum selection clause is presumed valid under federal law and enforcement will be ordered unless it clearly would be "unreasonable and unjust, or the clause was invalid for such reasons as fraud or over-reaching." *MIS Breman v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.,* 858 F.2d 509, 512 (9th Cir. 1988).

As set forth above, the PSA contains the following forum selection clause:

> This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. ***The exclusive forum for any actions related to this Agreement shall be in the** state courts, and, to the extent that federal courts have exclusive **jurisdiction, in** Los **Angeles, California.*** The parties consent to such venue and jurisdiction and waive any right to a trial by jury. (Emphasis added.)

eBay cannot disregard the provision it drafted and required KFC to agree to, simply because the provision is no longer convenient.

Pursuant to 28 U.S.C. § 1391(b) venue in federal question cases is proper in the following judicial districts and no others: (1) if all defendants reside in the same state, a district were any defendant resides, or (2) a district in which a substantial part of the events on which the claim is based occurred, or (3) if there is no district were the action can otherwise be brought, the district in which any defendant may be found.

First, eBay is aware that all named defendants reside or are located in the Central District (Orange County) or the Southern District (San Diego County). Having selected the forum, it is eBay's burden to prove otherwise. *Airola v. King, 505* F. Supp. 30, 31 (D. Az. 1980). Further, the alleged events that form the basis for the action could only have occurred where the named defendants are located, i.e., the Central and Southern Districts. Protecting defendants from being hauled into court in a distant forum, the statutory reference to "events or omissions giving rise to the claim" requires courts to focus on the relevant activities of the defendant, not the plaintiff. *Woodke v. Dahm,* 70 F. 3d 983, *985* (8th Cir. *1985).* In the Complaint eBay alleges that Defendants' alleged cookie stuffing scheme was "accomplished through software programs or code." (Complaint at § 25*).* The development of any such software or code was clearly done at the Defendant's locations in the Central and Southern Districts.

In considering a 12(b)(3) motion, a court need not accept the pleadings as true and may properly consider facts outside of the pleadings. *See, Kukje Hwajae Ins. Co. v. The "M/V Hyundai Liberty,"* 408 F.3d 1250, 1254 (9th Cir. 2005). Enforcement of contractual forum selection clauses are procedural issues to be decided under federal law. Where a forum selection clause is at issue, a motion to dismiss pursuant to 12(b)(3) is appropriate. *Argueta* V. *Banco Mexicano, S.A.*, 87 F.3rd 320, 324 (9th Cir. 1996). Venue is not proper in the Northern District and the action should be dismissed on this basis.

8. THIS COURT LACKS JURISDICTION OVER EBAY'S STATE LAW CLAIMS AND THE ACTION SHOULD BE DISMISSED

For the reasons discussed above, eBay's federal statutory claims are fatally flawed. Without them, this Court should not exercise supplemental jurisdiction over eBay's claims under California law. eBay has not, because it cannot, asserted diversity jurisdiction because the parties are not completely diverse. When the Court's jurisdiction over state law claims rests solely on supplemental jurisdiction under § 1367, and the federal claims are dismissed, the Court should also dismiss the state law claims for failure of jurisdiction. 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Trigon Ins. Co. v. Columbia Naples Capital, LLC,* 235 F.Supp.2d 498, 507 (E.D. Va. 2002) (Hudson, J.) (dismissing state claims where federal claims dismissed under Rule12(b)(6)).

9. CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests that the Court dismiss the within complaint with prejudice.

DATED: November 6, 2008

LAW OFFICE OF PATRICK K. McCLELLAN

BY: [signature]

PATRICK K. Mc CLELLAN
Attorney for Defendant
Kessler's Flying Circus

Exhibit 1